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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 588

HLH PRODUCTS, DIVISION OF HUNT OIL CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Statute:

Labor Management Relations Act, 61 Stat. 136, *et seq.* (1947), 29 U.S.C. § 151, *et seq.*:
Section 8(a)(1) 2, 7, 8, 9, 10, 11, 13, 15, 16, 17, 18
Section 8(a)(3) 2, 7, 8, 9, 10, 11, 13, 15, 16, 18
Section 8(a)(5) 8, 9, 10, 15, 16
Section 10(b) 2, 11, 12, 13, 14

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Petitioner, HLH Products, Division of Hunt Oil Co., prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit, entered on June 6, 1968.

Opinions Below

The opinion of the Court of Appeals is unofficially reported at 68 LRRM 2454. The opinion is printed in the Appendix hereto at page 21a. The opinion of the National Labor Relations Board is reported at 164 NLRB No. 61, and is printed in the Appendix at page 19a.

Jurisdiction

The decision of the Court of Appeals was entered on June 6, 1968. An order denying a petition for rehearing

was entered on July 8, 1968. The decree of the Court of Appeals was entered on July 8, 1968. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Question No. 1

When a company adopts a nondiscriminatory plan to reopen and restaff its plant, may the Board find a violation for failure to recall old employees which is inescapably grounded on events occurring prior to the limitations period under Section 10(b)?

Question No. 2

Where it is found that a company has, for discriminatory reasons, failed to recall old employees, and there is no showing that the traditional remedies of reinstatement, back pay, and posting of notices will be inadequate, is an order directing bargaining appropriate?

Statute Involved

The statute involved is the Labor Management Relations Act, 61 Stat. 136, et seq. (1947), 29 U.S.C. § 151, et seq. The specific sections involved are 8(a)(1) and (3) and 10(b). They are set forth in the Appendix at page 28a.

Statement Of The Case

The Facts

Petitioner (hereinafter called the "Company"), is engaged in the food processing business and operates a plant in Muncie, Indiana. The plant was purchased by the Company in December, 1961. (J.A. 339) [1]

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1. "J.A." refers to the joint appendix filed in the Court below.

At the time of the purchase, Local 135 of the Teamsters was the bargaining representative. Within a year after the Company's acquisition of the plant, petitioner and Local 135 of the Teamsters executed a collective bargaining agreement. (J.A. 339, 367) Among other provisions, such contract established plant-wide seniority and provided that filling jobs and layoffs were to be done according to seniority. (J.A. 367) The terms and provisions of this contract expired in accord with the term of the contract on March 31, 1964. (J.A. 339)

Since the expiration of the 1962 contract, no collective bargaining agreement has been in effect at the Company's Muncie plant. (J.A. 373-74) After the expiration of the contract, a decertification election was held and Local 135 of the Teamsters won the election and became the certified bargaining representative. (J.A. 203, 361-64) Following the election, the Company and the Union entered into negotiations for a new contract, but an agreement was never signed. (J.A. 341, 348-49, 358)

Petitioner's Muncie plant was closed on February 4, 1965. Three to five truckloads of potatoes in the warehouse and some machinery were shipped to the Company's plant at Alma, Arkansas. Other inventory on hand and quality control equipment were shipped to a plant about 40 miles from Muncie. (J.A. 341-42)

When the plant was closed, the plant manager told the assistant union steward and the union steward the plant was going to cease operations and that it looked like it was permanent. He also told some employees that the shutdown was to be permanent. (J.A. 110-11, 250) On February 4, 1965, a notice was posted stating that as of that day at the end of the shift, "this plant will cease operation." (J.A. 365) When the plant was closed, the employees were considered terminated and accrued vacation benefits were paid. Such accrued benefits were not paid on temporary layoffs. (J.A. 60-61)

Within a month and a half after the plant was shut down, a decision was made that the plant should be sold. Following this decision, contacts were made with prospective purchasers of the Muncie facility. (J.A. 234, 264) In mid-March, 1965, an attorney for the Company carried on negotiations with a local group. He had authority to prepare the necessary legal documents and commit the Company to a sale of the plant on the proposed terms. (J.A. 264-65)

The attorney, John Livingston, contacted a representative of the group of Muncie citizens interested in buying the plant, but Mr. Livingston was informed that the group had decided not to buy the plant at that time. Two of the reasons given to Mr. Livingston for the group's decision not to buy were that the plant was shut down and the Company had failed to contract with local growers for a crop of tomatoes for the ensuing canning season. (J.A. 265-66) It was decided that other prospective purchasers would feel the same way, and that a crop of tomatoes should be planted so a prospective purchaser could operate the plant the next season with a crop of tomatoes available. Mr. Livingston was advised to make an effort to get a crop planted, even though the usual time for doing so had passed. (J.A. 267-268)

Following some difficulty, Keith Sparks, who had been the Company's former manager, was rehired and he arranged to get a crop of tomatoes in the ground. (J.A. 283-85, 342)

After Mr. Sparks was hired on April 1, 1965, and a crop of tomatoes arranged for, it began to appear possible that either the Company or a purchaser would operate a tomato pack in the summer of 1965. (J.A. 277, 342) However, a sale of the plant not having been consummated, a decision was made in June or by mid-July that the Company would run a tomato pack at Muncie in 1965, and

new plant manager John Volz was instructed by the Company president on July 15, 1965, to recruit labor for the processing of tomatoes. (J.A. 278-79, 315-16, 236, 342)

When the possibility of running a tomato pack at Muncie became apparent, Mr. Volz, new plant manager, became concerned about how he was going to restaff the plant. Volz inquired of the Indiana Employment Security Division about recruiting farm as well as in-plant workers. The role which could be played by Employment Security was explained and sample recruitment letters were sent to company officials in Dallas for approval. (J.A. 277-78, 401-03)

The letter for solicitation of in-plant workers stated that applications would be taken at the office of the Employment Security Division in Muncie. Office help in the Muncie plant was short at the time, and the office workers were not free to process applications. (J.A. 278) Employment Security accumulated a pool of available workers coded according to work preferences. The Company could then place a single phone call to Employment Security and any number of previously screened applicants would appear for work. The need for the screening of applications by Company personnel was eliminated, and the services provided by the Employment Security Division were performed at no cost to the Company. (J.A. 296-97, 328-29)

When it was decided that the Company would run the Muncie plant through the tomato season, Volz gave instruction to see that a list of former employees was prepared and delivered to Employment Security so that recruitment letters could be mailed. (J.A. 279)

It was decided that the 1964 earnings records would be used to compile a list of names of people who might be interested in working. (J.A. 285-86) Certain groups of employees were omitted from the list. The names of truck

drivers were not included; the names of employees working at the Company at the time were not placed on the list; the names of employees whose addresses did not appear on the earnings cards were not put on the list. (J.A. 306-07)

The list was delivered to Employment Security around July 20, 1965. (J.A. 286-87, 302, 317) Letters were sent to all the persons on the list except a few who were marked off by Sparks. Those marked off were people who ordinarily were field help, not factory help. Letters were not sent to those persons listed with out-of-Indiana addresses. Some of the letters were returned. (J.A. 291-92, 287)

The letter sent to the persons on the list advised that the Company needed men and women to process tomatoes. The recipient was invited to apply at the Indiana Employment Service in Muncie on July 22 and 23, 1965. (J.A. 387) Employment Security also ran an advertisement in the Muncie newspaper and hired radio time to publicize the availability of jobs in canning plants. (J.A. 342, 292) A pool of workers was created for referral to the Company when workers were needed and the pool was available to any food processors needing workers. (J.A. 503, 342)

When an order came in for workers from the Company, a clerk at Employment Security went to the group coded for food processors and pulled the requested number of cards. If registrants happened to be in the Employment Security office when the work order came in, these registrants were referred to the Company. (J.A. 292-93) After picking a group of cards from the file, telephone calls were made to the persons listed on the card. If there was a response to the phone call, the registrant was referred to the Company. If there was no response to the phone call, the next person in the group of cards was called until the required number had been referred. (J.A. 300)

There were no requests from the Company that specific persons be referred or not referred. No requests for per-

sons by name were made. Requests were invariably made for so many workers, or particular job classifications. (J.A. 293, 303-04, 317-18, 328)

Instructions were given to the Company employment representative to hire the people who were felt to be best qualified to do the job, disregarding seniority. (J.A. 317-18, 309-10) Carrying out these instructions, the criteria used in determining whether to hire a particular applicant were whether there was an opening available in the plant, next, whether the applicant was presently available, and finally, whether the applicant was best qualified of all the applicants for the opening. (J.A. 318)

The Company talked to more than 700 people and hired about 600 during the tomato pack of 1965. These figures include the peelers who were excluded from the bargaining unit. (J.A. 327, 344) Because of the indefinite status of the Muncie operation, each applicant was told the work would be seasonal. (J.A. 54, e.g. 118, 140)

At the time the plant was reopened, it had been shut down for five months, and each person requesting work at the plant, except the peelers, was required to fill out an application. (J.A. 54-55, 344) During the prior nine years, layoffs had never been longer than six to eight weeks. (J.A. 58-59) Following these layoffs employees had been recalled by telephone or postcard notice. J.A. e.g. 119, 123, 132)

Thirty-nine former employees were rehired after July 17, 1965. All these employees had paid union dues under the 1962 contract, and a majority of them had signed check-off authorizations. (J.A. 367, 388) Prior to the plant closing the bargaining unit had about 100 employees. (J.A. 346)

On November 2, 1965, a charge was filed with the Board charging violations of Section 8(a)(1) and (3) of the Act. (J.A. 6) A complaint was issued in December, 1965, and

on April 19, 1966, an amended charge was filed alleging a refusal to bargain, and an amended complaint was filed alleging violations of Section 8(a)(5). The violation of Section 8(a)(3) was alleged to be the failure of the Company to recall and reemploy former employees who were named as discriminatees.

The Trial Examiner's Decision [2]

The Trial Examiner found that the employees working for the Company at the time of the plant closing constituted a competent work force, that "seasoned men are better than greenhands," and that prior to February, 1965, it was the Company's practice to recall employees by telephone or postcard. (App. 8a) He found that the Company did not accord old employees priority of referral, and that under those circumstances, and "evaluated against . . . [the Company's] sponsorship of a decertification petition and its threats before the July, 1964, election to close the Muncie plant if the Union won the election" the Company "failed to recall and reemploy the workers employed before the shutdown . . . because it knew that most of them were union supporters and it wanted to keep the Union out of the plant." (App. 9a)

The Trial Examiner also found that since the Company "denied the complainants priority of employment for anti-union reasons" he found "no merit in its argument that the method it adopted to restaff its plant by referral from the Indiana Employment Security Division did not discriminate against union applicants." (App. 11a)

The Trial Examiner further found violations of Section 8(a)(1), and a violation of Section 8(a)(5) by the Company's refusal to bargain with the Union concerning recall of employees in July, 1965. He recommended rein-

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2. Printed in the Appendix beginning at page 1a.

statement of the 65 complainants, and that the Company bargain with the Union upon request. (App. 13a)

The Decision of the National Labor Relations Board[3]

The board affirmed the Trial Examiner, but went on to find that the "discriminatory recall policy" itself constituted a refusal to bargain, and found it unncessary to pass on the Trial Examiner's reasoning behind his finding of a violation of Section 8(a)(5). The Board based its bargaining order upon the Section 8(a)(5) violation. That finding was in turn based upon the Section 8(a)(1) and (3) activity found by the Trial Examiner. It also stated:

> "An affirmative order would in any event be required here to restore the status quo ante and to remedy the 8(a)(1) and (3) violations we have found because the Respondent's conduct clearly evinces a rejection of its duty to bargain collectively as evidenced by the flagrant 8(a)(1) and (3) conduct which we have found." (App. 20a)

The Court of Appeals Decision[4]

The Court of Appeals affirmed. It found the Trial Examiner's finding of a violation of Section 8(a)(3) supported by substantial evidence in the record as a whole. In its discussion of the finding of a refusal to bargain and the order to bargain, the Court examined the Board's finding of a Section 8(a)(5) violation, and the Board's further statement that the violations of Section 8(a)(1) and (3) required an affirmative bargaining order. The Court held:

> "Both lines of reasoning asserted by the board make sense in the circumstances of this case. We choose to rest our decision, enforcing the order, including the requirement to bargain, upon the latter." (App. 25a)

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3. Printed in the Appendix beginning at page 19a.
4. Printed in the Appendix beginning at page 21a.

The Dissenting Opinion[5]

Senior Circuit Judge Knoch dissented in part. He felt that the Board's finding of a violation of Section 8(a)(5) based upon the recall policy was unreasonable and that it was for this reason that the majority chose to rely upon the Section 8(a)(1) and (3) findings to justify the bargaining order. He went on to state:

> "However, absent a finding of a § 8(a)(5) violation, I believe that a bargaining order is an appropriate remedy only:
>
> 'In those exceptional cases where the employer's unfair labor practices are so outrageous and pervasive and of such a nature that their coercive effects cannot be eliminated by the application of traditional remedies . . . .' *NLRB v. S.S. Logan Packing Co.*, 4 Cir., 1967, 386 F.2d 562, 570.
>
> "See also *NLRB v. River Togs, Inc.*, 2 Cir., 1967, 382 F.2d 198; *NLRB v. Flomatic Corp.*, 2 Cir., 1965, 347 F.2d 74, 77.
>
> "I cannot agree that this is such an exceptional case that a bargaining order is justified as an appropriate remedy for the § 8(a)(1) and (3) violations which were found." (App. 26a-27a)

Reasons For Granting The Writ

Question No. 1

The Board's specific finding of a violation of § 8(a)(3) was that the Company refused to recall and reemploy sixty-five employees because of their union activity. The supporting findings were as follows: (1) In light of the Company's practice of recalling "laid-off" employees by telephone or postcard and the fact that seasoned men are better than greenhands, it "seems" that the Company would

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5. Printed in the Appendix beginning at page 26a.

have recalled its old employees when it reopened. (2) Anti-union statements were made to several former employees. (Only two isolated statements were found to be in violation of § 8[a][1]). (3) The Company sponsored a decertification petition and threatened to close the plant. These were all the reasons listed by the Trial Examiner in support of his conclusion as adopted by the Board.

Section 10(b) of the Act provides in pertinent part:

> "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board, and the service of a copy thereof upon the person against whom such charge is made * * *."

The original charge alleging § 8(a)(3) violation was filed on November 2, 1965. Therefore, the "cut-off date" in this case under Section 10(b) is May 2, 1965. Of the reasons stated by the Trial Examiner, only the five isolated "anti-union" statements occurred within the six-months period, and only *two* of these were sufficient to be found § 8(a)(1) violations. Every other *fact* relied upon by the Trial Examiner, and necessarily by the Court below, occurred outside the § 10(b) limitations period.

Furthermore, it is clear that the acts which occurred prior to the cut-off date were the basis for the Trial Examiner's finding, and were controlling. The opinion of the Court of Appeals also is clearly grounded upon facts outside the § 10(b) period. It makes reference to the finding "that anti-union statements were made to several", but that is the only fact relied upon which occurred after May 2, 1965.

The Court of Appeals recognized "a wealth of evidence that the company had been aggressive in its opposition to the union in the past." It was this evidence which was used by the Board as the basis for its conclusion that a

legal hiring plan was discriminatorily motivated. Such use of the evidence was improper.

There has not been a specific finding in this case that the plan adopted by the Company to restaff its plant was discriminatory. However, the holding in this case necessarily implies that an employer has to choose a particular method to rehire or recall employees. The only legal requirement heretofore has been that a plan to recall, rehire, or restaff not be discriminatory. In *Breckenridge Gasoline Co.*, 127 NLRB 1462 (1960), the Board held that § 8(a)(3) requires only that an employer not discriminate against former employees in making new hirings. Therefore, it was incumbent on the Board in the instant case to show that the employees who were not reemployed were treated differently from those who were hired.

Discrimination requires a showing of disparity of treatment. *N.L.R.B. v. Murray Ohio Manufacturing Company,* 326 F.2d 509 (6th Cir. 1964). The Board made no attempt to determine whether the application of the Company's plan of reemployment resulted in disparate treatment. Apparently the Trial Examiner would have chosen a different plan because of his feeling that old employees are "better" than new ones, but his judgment or differing opinion cannot be used as a specific finding of disparate treatment. In fact the reemployment plan adopted by the Company was not discriminatory.

Since the restaffing plan was not discriminatory in operation, the Board has chosen to find that the *use* of the plan was discriminatorily motivated. There is no express finding made to this effect, but it is implicit in the finding that the failure to recall old employees was discriminatory. The Board arrived at this conclusion by examining evidence of events prior to the § 10(b) date, and concluding that in view of its earlier conduct, the Company was improperly motivated in its later action.

Such action by the Board would be proper if the prior conduct was considered merely as "background" to shed light on later events. But that is not the case here. Absent the evidence which falls outside the § 10(b) period, the record reveals only the use of a non-discriminatory hiring plan, and two isolated § 8(a)(1) violations. It is clear that but for the evidence occurring outside the § 10(b) limit, no violation could be found. The Board's finding of a violation of Section 8(a)(3) is inescapably grounded on the events predating that limitation period. This Court has held that this is directly opposed to the purposes of § 10(b) of the Act.

In *Local No.* 1424, *International Machinists v. N.L.R.B.* 362 U.S. 411 (1960), this Court held:

> "[A] finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the Section 10(b) proviso." 362 U.S. at 422.

The Court explained the distinction between a situation to which this principle is applicable and one in which background evidence may be used:

> "It is doubtless true that § 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of § 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the

> limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is timebarred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice." 362 U.S. at 416-17.

The situation before the Court in the instant case is barred by the statute. The decertification petition, the threats to close the plant, the plant closing itself, and the "wealth of evidence" to which the Court below referred, were facts which occurred more than six months prior to the filing of the charge. These events were not merely used as background information. They were obviously considered as controlling evidence. They were the acts upon which the Board relied in finding the failure to recall old employees to be a discriminatory act.

The Board itself has recognized the limitation which § 10(b) contains in a comparable situation. In *News Printing Co., Inc.*, 116 NLRB 210 (1956), the evidence contained facts which, standing alone, did not constitute violations of the Act. However, the trial examiner relied on an earlier case involving the same employer in order to infer a pattern of unlawful conduct. The earlier case involved conduct occurring more than six months before the filing of charges in the second case. The Board found that the trial examiner had not limited his consideration to background evidence, but had necessarily relied upon the earlier case as controlling evidence. It held:

> "While evidence, whether record or in the form of prior Board findings, concerning conduct which occurred prior to the statutory 6-month period may be utilized as background evidence to evaluate a

> Respondent's subsequent conduct, it is well established that Section 10(b) of the Act precludes the Board from giving independent and controlling weight to such evidence. Although the earlier *News Printing* case was admissible as background evidence, it was improper for the Trial Examiner to give it independent and controlling weight in determining whether the Respondent has discriminatorily denied wage increases to the Charging Parties in violation of the Act." 116 NLRB at 212

Both *Local No. 1424* and *News Printing* are applicable here. Each, in effect, held that there must be sufficient evidence in the record, within the § 10(b) period, to find a violation of the Act. That evidence may be explained by events predating the limitations period, but those events may not be given controlling significance.

Petitioner submits that the findings of the Board and the order of the Court of Appeals were inescapably grounded on conduct outside the six months period. This is contrary to the provisions of § 10(b) of the Act.

Question No. 2

The majority opinion of the Seventh Circuit in the instant case noted that the Board's affirmative bargaining order rested on the proposition that the Company's recall policy in July and August of 1965, by its very nature, was a violation of § 8(a)(5). The majority opinion also noted that the Board's bargaining order was based on the alternative ground of being proper to remedy the violations of § 8(a)(1) and (3). Although stating that both grounds "make sense" the majority chose to rest its decision only on the latter ground, holding that an affirmative bargaining order was the appropriate remedy for violations of § 8(a)(1) and (3).

The dissenting opinion recognized the unfairness of requiring the Company to anticipate that the § 8(a)(1) and (3) allegations of the complaint would ultimately be the

basis of a finding by the Board that § 8(a)(5) had been violated.

The dissenting Judge noted that the majority had granted enforcement to the Board's bargaining order on the theory that the affirmative bargaining order constituted an appropriate remedy for the violations of § 8(a)(1) and (3). Recognizing that only in exceptional cases is a bargaining order proper to remedy violations of § 8(a)(1) and (3), the dissenting opinion could not agree that this was such an exceptional case.

Various Courts of Appeals have issued divergent opinions on the question of whether an affirmative bargaining order is an appropriate remedy absent either a showing that the traditional remedies for the violation found would be inadequate or a finding that § 8(a)(5) had been violated.

The Third Circuit enforced a bargaining order in the absence of a § 8(a)(5) violation in *Piasecki Aircraft Corp. v. N.L.R.B.*, 280 F.2d 575 (3d Cir. 1960), *cert. denied*, 364 U.S. 933. A bargaining order was upheld by the First Circuit on a finding of § 8(a)(1) and (3) violations in *Editorial "El Imparcial" Inc. v. N.L.R.B.*, 278 F.2d 184 (1st Cir. 1960). The District of Columbia Circuit has enforced a bargaining order where it was supported only by findings of § 8(a)(1) violations. *United Steel Workers of America (Northwest Engineering Co.) v. N.L.R.B.*, 376 F.2d 770 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 932.

In contrast, the Second Circuit has held a bargaining order to be an inappropriate remedy for a § 8(a)(1) violation. *N.L.R.B. v. Flomatic Corporation*, 347 F.2d 74 (2d Cir. 1965). The Court there recognized that a bargaining order is "strong medicine," and cautioned that "its potentially adverse effect on the employees' § 7 rights must not be overlooked." 347 F.2d at 78. The Court elaborated:

> "Since a bargaining order dispenses with the necessity of a prior secret election, there is a possibility

that the imposition of such an order may unnecessarily undermine the freedom of choice that Congress wanted to guarantee to the employees, and thus frustrate rather than effectuate the policies of the Act." 347 F.2d at 78

More recently the Second Circuit has again held that activities constituting violations of § 8(a)(1) do not, in themselves, justify the imposition of a bargaining order. *N.L.R.B. v. River Togs, Inc.*, 382 F.2d 198 (2d Cir. 1967).

A bargaining order was held unenforceable in *River Togs* even though Board findings were upheld that the employer had been quoted by a supervisor in a speech to employees to the effect that he knew which employees had attended a union meeting, that he would close the plant before he would allow union organization, and that any employee who wanted a union could leave the plant. In addition, the employer had sent an employee to the union meeting for the purpose of taking pictures and later had reproached him in front of other employees for his failure to obtain such pictures. The employer also had told one of his employees not to bother purchasing a house because he would not be able to buy the house if he did not have a job and none of them would have jobs. These activities were held insufficient to justify the imposition of an affirmative bargaining order.

The Sixth Circuit has held insufficient to justify a bargaining order a finding of fourteen separate violations of § 8(a)(1), involving statements made by store managers to employees. *Peoples Service Drug Stores, Inc. v. N.L.R.B.*, 375 F.2d 551 (6th Cir. 1967).

The same rule was recently applied by the Fourth Circuit, in refusing to uphold a bargaining order where the employer had questioned employees about a union meeting and had made anti-union remarks and threats of loss of benefits if the union should win an election. *Crawford*

Manufacturing Co. v. N.L.R.B., 386 F.2d 367 (4th Cir. 1967), *cert. denied*, — U.S. —, 20 L. Ed. 286.

The affirmative bargaining order has been characterized by the Fourth Circuit as follows:

> "The remedy is an extraordinary one, however, and, in light of the guaranty of § 7 of employees' rights not to be represented, its use, if ever appropriate, must be reserved for extraordinary cases." *N.L.R.B. v. S.S. Logan Packing Company*, 386 F.2d 562, 570-571 (4th Cir. 1967).

The instant case affords an opportunity for this Court to examine the circumstances which will render a bargaining order appropriate to remedy § 8(a)(1) and (3) violations. The Company submits that having made such an examination this Court should conclude that the traditional remedies of reinstatement with back pay, notice posting, and cease and desist orders adequately remedy the violations found in this case.

There is no showing in this case that the traditional remedies will be inadequate to remedy the coercive effects of the unfair labor practices found. In the absence of such a showing, a bargaining order is inappropriate. *N.L.R.B. v. S. S. Logan Packing Company, supra.* With reinstatement, back pay and posting of notices, the Company's employees will be able to exercise all the rights guaranteed them under the Act. There is no showing that the exercise of such rights would be fruitless with respect to the selection of a bargaining representative. Presumably the order of reinstatement will be adequate to restore such union sympathy as existed before the unfair labor practices occurred. It is unlawful discharges and coercive statements that are to be remedied and not a refusal to bargain.[6] This fact is central to the question of the propriety of the

6. For the purpose of arguing the issues with respect to the bargaining order, the Company has not questioned the affirmation by the Court of Appeals below of the Board's § 8(a)(3) findings.

Seventh Circuit's enforcement of the Board's bargaining order in the instant case.

Because of the conflict in authority among the various Courts of Appeals with regard to the propriety of an affirmative bargaining order under the circumstances presented by the instant case, the Company respectfully submits that a writ of certiorari should issue and that this Court ultimately should deny enforcement of the Board's bargaining order.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 30, 1968

TRIAL EXAMINER'S DECISION.

Statement of the Case.

This proceeding was heard in Muncie, Indiana, on June 6, 7, and 8, 1966, by Trial Examiner Melvin Pollack on the complaint of the General Counsel and the answer of HLH Products, Division of Hunt Oil Co., herein called Respondent.[1] Respondent closed down its Muncie plant on February 4, 1965, and resumed operations about August 1, 1965. The principal questions presented are whether upon resuming operations, Respondent (1) unlawfully refused to bargain with a certified union and (2) discriminatorily failed to recall and reemploy 65 employees in the bargaining unit.[2] All parties appeared and were afforded full opportunity to be heard and to examine and cross-examine witnesses. Briefs have been received from General Counsel and Respondent.

Upon the entire record in the case, the briefs, and my observation of the witnesses, I make the following:

Findings and Conclusions.

I. The Business of Respondent.

Respondent, a Delaware corporation, is engaged in the processing and canning of food products at plants in several States, including a plant in Muncie, Indiana. Respondent's annual interstate sales and purchases each exceed $50,000. I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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1. The charge herein was filed on November 2, 1965, and an amended charge was filed on April 19, 1966. A complaint alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, at Respondent's Muncie plant issued on the original charge on December 30, 1965. An amendment to the complaint based on the amended charge issued on May 3, 1966, alleging a violation of Section 8(a)(5) of the Act. A list of alleged discriminatees attached to the complaint was amended at the hearing.

2. The alleged discriminatees are hereinafter sometimes referred to as the complainants.

II. The Labor Organization Involved.

Local 135, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices.

A. Sequence of Events.

Respondent purchased its plant at Muncie, Indiana, from William Butterfield in December 1961 and retained Butterfield as plant manager. Respondent's production, maintenance, and warehouse employees were then represented by the Union. On September 7, 1962, Butterfield, in behalf of Respondent, executed a collective-bargaining contract with the Union. The contract expired on March 31, 1964. Sometime thereafter, Butterfield and several employees met at a restaurant during working hours and discussed voting the Union out. Butterfield at this time was no longer plant manager but worked as a "troubleshooter" for Respondent's president, Harold L. Hunt, and frequently appeared at the Muncie plant.[3] Foreman Jim Reynolds, who had set up the meeting in the restaurant at Butterfield's request, subsequently used a Company car to drive employee Bob Everhart to the Board's office in Indianapolis, where Everhart filed a petition for decertification of the Union. An election on this petition was scheduled for July 17, 1964.

Butterfield visited many employees at their homes before the election and urged them to vote against the Union if they wanted to keep their jobs. For example, he told A. V. Harry that Mr. Hunt would not let other people run his business and would shut the plant down if the Union won the election, told Mary O'Neal that he could "guarantee" her work if the Union was voted out but could also "guarantee" that she would be out of a job "in less than a year" if the Union won the election, told Thelma Little that her job depended on getting the Union out, and told Norma

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3. The record does not disclose Butterfield's precise relationship to Respondent.

Benedict that "Mr. Hunt . . . had no use for a union" and that the employees surely would be without a job if the Union won the election because Mr. Hunt "would close the plant before he would recognize a union."

Butterfield also campaigned against the Union at the plant. He told employees Willard Reynolds, Scott, and Wright that Mr. Hunt would "close the doors" if the Union was not voted out. On the day before the election, production was halted at the plant so that Butterfield could address some 20 women employees. Butterfield included in his remarks a warning that President Hunt would close the plant within 6 months to a year if the Union won the election.[4]

The election was held as scheduled, the Union won by a vote of 65 to 25, and was certified on July 27, 1964, as the bargaining agent of the production, maintenance, and warehouse employees at the Muncie plant, including garage employees, janitors, inspectors, and local truck drivers.

Respondent and the Union began bargaining on August 11, 1964, and seemingly agreed on a new contract which was approved by the union membership on September 18, 1964. However, at a meeting on October 1, 1964, Plant Manager Peter J. Lux[5] and Business Agent Virgil Barber presented different versions of the contract. Each man insisted that his version was the one previously negotiated and refused to sign the contract presented by the other.[6]

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4. A person called the "chicken woman" by the employees, who had been sent to the Muncie plant by President Hunt, similarly warned Norma Benedict that failure to vote the Union out would mean that Hunt would close the plant within 6 months. A week or so before the election, the "chicken woman" asked Audrey Rutledge (the Charging Party in this proceeding) to become a supervisor. Rutledge refused. A few days later, the "chicken woman" told Willard Reynolds that the Union would probably lose the election "if they could put Audrey out of the way." Zelpha Gibson testified that the "chicken woman" asked her to name employees who "would be safe to go to and talk to concerning voting the union out."

5. Lux was manager of the Muncie plant from July 31, 1964, until May 15, 1965.

6. Lux reiterated in letters to Barber dated October 1 and 8, 1964, his position that the contract presented by Barber contained extensive changes from the contract submitted by Respondent and allegedly accepted by the Union. Barber did not reply to these letters.

On February 4, 1965, Respondent closed the Muncie plant.[7] Three to five truckloads of potatoes in the warehouse and some machinery were shipped to Respondent's plant at Alma, Arkansas. Other inventory on hand and quality control equipment were shipped to Respondent's Plum Tree plant, which is about 40 miles from the Muncie plant.

In March 1965, a group of businessmen in the Muncie area and also the American Maize Company showed interest in the purchase of the Muncie plant. No sale was effected, however, and Respondent took steps looking toward a reopening of the plant for the tomato season beginning about the first of August. Keith Sparks, Respondent's former Farm Manager, who had been laid off on March 5, was recalled about March 20 and reported on April 1, 1965. Sparks purchased tomato crops and made arrangements for their harvesting. On May 15, 1965, Plant Manager John C. Volz of the Plum Tree plant replaced Peter Lux as plant manager of the Muncie plant. At this time, maintenance employees were preparing the plant for the coming season. On July 15, President Hunt instructed Volz to recruit labor for the processing of tomatoes. It had been Respondent's practice to recall laid-off employees by post card or telephone. Volz did not follow this practice, however, but supplied the Indiana Employment Security Division with a list of employees compiled from Respondent's records. Pursuant to arrangements with Respondent, the Division sent these employees letters advising them that Respondent needed men and women to process tomatoes and inviting them to register with the Division on July 22 and 23, 1965. The Division also advertised for cannery workers by newspaper and over the radio. Persons who responded to the letters and advertisements were registered for referral to food processing plants. The Division thereafter filled requests for seasonal cannery workers from Respondent and other food processors by telephone calls to persons selected at random from a file of flagged cards.

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7. Employee Russell Pollard testified that Plant Manager Lux and Foreman Albert Glass told him the plant was being shut down because of the Union. Lux and Glass denied making any such remark to Pollard. I credit Pollard. *Infra*, footnote 9.

By letter dated July 23, 1965, Business Representative Barber of the Union requested Respondent to recall employees "in their seniority order" and "to meet with our representatives to negotiate a new contract." Respondent replied on July 27 that operations at the plant would probably be "temporary and seasonal," that its contract with the Union had expired, and that it believed "former employees of our Muncie plant have better employment than we can provide." On August 2, Barber answered that Respondent's "former" employees "regardless of . . . how you may describe them" had "first right" to jobs in the reopened plant, that these employees "Do Claim Such Jobs," that the Union's letter was a "Notice as to Such Claim," that "in most instances" it was not true that the employees had better jobs than Respondent could provide, and that, as the certified bargaining agent of the Muncie plant employees, the Union "would like to sit down with you and work out the problems as to the re-hire of said former employees as well as the terms of a current collective-bargaining agreement." Respondent rejected the Union's demands on August 9, stating "we believe that representations in our previous letter to you of July 27, 1965, are true and correct." On August 24, Respondent again rejected the Union's position as reaffirmed in a letter dated August 18.

Meanwhile, Volz left the Muncie plant on July 28, 1965, to resume his position as manager of the Plum Tree plant. Plant Manager Chester Miller from Respondent's plant in Sanford, Florida, took over as acting manager of the Muncie plant. At this time, in addition to maintenance personnel, Respondent's employees included two office girls, quality control personnel Melvin Fields and Stella Bell,[8] and foremen Himes, Albert Glass, and Strunk. Toward the end of July, Miller put Fields in charge of hiring plant personnel. Fields, who succeeded Miller as plant manager about August 14, interviewed some 700 applicants for employment during the 1965 tomato pack and hired about 600

8. Following the February 2, 1965, shutdown, Fields was transferred from the Muncie plant to the Sanford plant. He reported back to the Muncie plant on July 12, 1965. Bell was recalled sometime thereafter by Fields.

of them. Hourly paid employees filled out applications for employment. Persons hired as "peelers"—a category of employment not included in the Union's certification—were not required to fill out applications. Fields hired almost exclusively persons referred by the Indiana Employment Security Division. Some of these persons worked for only a single day or part of a day.

A number of "old hands" unsuccessfully applied for work at the plant. Jackie Robinson asked Plant Manager Volz 3 or 4 weeks before the tomato pack began if he had "a chance of getting a job" and Volz replied that he "didn't see how [Respondent] could get out of" calling "the old employees back." Robinson returned to the plant in August and asked Fields for part-time work. Fields said all jobs were filled. Russell Pollard, a laborer at the Muncie plant for 10 years, asked Fields for part-time work before the tomato pack began. Fields referred Pollard to the plant manager—then Chester Miller—who was in the cafeteria. Miller first questioned Pollard about his union membership and then said, "we just don't want union members in the plant." As Pollard was leaving the plant, he ran into Albert and Paul Glass and was told that Respondent did not want union men in the plant and that he should get out before he was "chased out."[9] About August 1, Rex Hart, a shipping department employee, asked Fields for work. Fields referred him to Supervisor Himes who said he needed help. Fields, however, did not hire Hart, saying that he did not want union trouble on his hands. Zelpha Gibson, a relief girl, spoke to Fields over the telephone early in August and was told "We're all filled up."[10] Willard Reynolds, a garage mechanic, who was interested in part-time work, asked Fields in mid-August

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9. Pollard was confused about dates and did not recall Miller's name or whether Miller came from Texas or Florida. The record shows, however, that Miller was the acting plant manager just before the tomato season started. As Pollard described his conversation with Miller and the Glasses with particularity and impressed me as a reliable witness, I credit his testimony concerning these conversations.

10. Gibson and her husband, Melvin, testified that supervisor Himes told them about 2 weeks before the start of the tomato pack that the plant would operate if the Union was kept quiet but would be closed down if "they got the Union started back up again." Casto Cooper, a

who was going to keep up the towmotor and trucks but received no answer. Mary O'Neal, who had worked on both tomatoes and potatoes, asked Fields for work four times between August and Labor Day. She told Fields on Labor Day that "two girls . . . was going to quit." Fields promised to put her to work if the girls quit. At least one girl, Betty Cook, quit but Fields did not recall O'Neal. Thelma Little, a potato sorter, similarly applied for work several times, but was told each time that no work was available. On September 16, Audrey Rutledge, Dean Bowles, and Anna Cowley asked Fields for work. Fields said they were "full up." Rutledge referred to a newspaper article about Respondent's employment of "welfare people" but Fields replied that "the paper was playing it up too big." Wilma and Allen Gates, and Pearl Holt also vainly sought work in the plant. Fields told Holt in November and again in December that new equipment was coming into the plant and more help might be needed after the first of the year.

Respondent began to process potatoes on October 18, 1965, selecting for this work employees who had worked on tomatoes. Plant Manager Fields told the employees that they were going to get a wage increase because the Muncie plant "was keeping its head above water and Mr. Hunt felt that they should all have a raise." The employees were given a raise of 12 cents an hour. Respondent also recognized seniority for shift assignments and vacations, using the original date of hire for the "old hands" employed after the reopening of the plant.

The certified bargaining unit included about 100 employees when the Muncie plant was shut down on February 2, 1965. Some 60 of these employees were not reemployed after the plant reopened in the summer of 1965.[11]

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towmotor operator, ascribed similar remarks to Himes and Supervisor Albert Glass. Himes and Glass admit conversations at the plant with these employees but deny making any anti-union remarks. I consider the Gibsons and Cooper trustworthy witnesses and credit their testimony.

11. The complaint as amended at the hearing alleges discrimination against 65 employees. Five of these employees worked in the reopened plant. Priscilla Duncan, Ann Throckmorton, A. V. Harry, and Gertie Burke were hired for the tomato pack but not for the potato pack. Bravel Dobbs was not reemployed until March 26, 1966.

B. Analysis and Conclusions.

1. The Discrimination in Hiring.

A seniority list of employees represented by the Union, posted at the Muncie plant on January 15, 1965, shows that, of 101 employees on the list, 39 started to work at the plant before Respondent purchased it from William Butterfield in December, 1961, that 29 employees started work in 1962, that 23 employees started work in 1963, and that only 10 employees started work in 1964 or 1965. The years of service put in by these employees, and the testimony of complainants at the hearing that their work had not been criticized, indicate that they constituted a competent work force. It had been Respondent's practice before the February, 1965 shutdown to recall laid-off employees by telephone or postcard. As "seasoned men are better than greenhands,"[12] it seems that Respondent would have adhered to this practice and recalled its old employees when it reopened the Muncie plant. As full-scale processing operations did not begin until approximately one month after President Hunt directed Plant Manager Volz on July 15, 1965, to recruit labor to process the 1965 tomato crop, Respondent had ample time to ascertain how many old employees were interested in returning to work at the Muncie plant. The recall of these employees was entirely compatible with Respondent's arrangements with the Indiana Employment Security Division to obtain plant personnel, for the Division sent applicants to the Muncie plant only upon request. Respondent, however, merely sent a list of 1964 employees to the Division without any instructions to accord them priority of referral, and thereafter refused to bargain with the Union over their recall. Even though many persons referred by the Division worked a day or less, Respondent did not hire old, reliable employees who appeared at the plant seeking work. Indeed, anti-union statements were made to several of them, including Russell Pollard, Rex Hart, Zelpha and Melvin Gibson, and Castro Cooper.[13]

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12. *N. L. R. B.* v. *Remington Rand, Inc.*, 94 F.2d 862, 872 (C. A. 2).

13. I find, as alleged in the Complaint, that Respondent violated Section 8 (a) (1) of the Act by Chester Miller's interrogation of

I find from the foregoing circumstances, evaluated against Respondent's sponsorship of a decertification petition and its threats before the July, 1964 election to close the Muncie plant if the Union won the election,[14] that Respondent failed to recall and reemploy the workers employed before the shutdown of February 2, 1965, because it knew that most of them were union supporters and it wanted to keep the Union out of the plant.

The General Counsel urges, as further background evidence of antiunion motivation in Respondent's hiring procedure, that Respondent reneged on a negotiated contract and that it "feigned" a permanent shutdown of the Muncie plant on February 2, 1965, as a step towards eliminating the Union and its supporters from the plant. Respondent argues that events after the election refute any inference of antiunion discrimination in hiring, that it bargained in good faith with the Union and that it was the Union which frustrated bargaining by reneging on a negotiated contract, and that it closed the Muncie plant because it was losing money and reopened it only to make it more attractive to prospective purchasers.

At their meeting on October 1, 1964, Plant Manager Lux and Business Agent Barker presented different versions of the contract allegedly negotiated and failed to sign a contract because each man insisted that his version of the contract was correct. The record does not warrant a determination that either party acted in bad faith, for it fails to show whether the parties actually reached agreement on a contract or only mistakenly believed they had done so. I therefore assume for purpose of analysis that both Respondent and the Union acted in good faith in presenting their different versions of the contract for signature. Re-

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Pollard about his union affiliation, and by Albert Glass' statement to Cooper that the plant would operate only if the Union was kept out.

14. Butterfield described himself as a "troubleshooter" for President Hunt and the record shows that Hunt instructed a truckdriver from the Muncie plant to take the "chicken woman" to the plant shortly before the election. Respondent permitted Butterfield and the "chicken woman" to carry on antiunion activity at the plant. I therefore find that Respondent is chargeable with their preelection conduct. *N. L. R. B. v. Byrds Manufacturing Corporation*, 324 F. 2d 329, 332 (C. A. 8), and the cases there cited.

spondent's willingness to sign a contract significantly different from one acceptable to the Union,[15] however, hardly compels an inference that it had abandoned its opposition to the Union. Indeed, as found below, Respondent, upon reopening the plant, unlawfully refused to resume bargaining with the Union.

Respondent's explanations for the closing and reopening of the Muncie plant are unconvincing. President Hunt allegedly closed the plant in February, 1965 because it was losing money, decided in March to contract for tomatoes and ready the plant for the 1965 tomato pack so that the plant could be more readily sold, and in June or July issued instructions to run the pack because the plant had not yet been sold. An "Income Statement" put into evidence by Respondent shows losses for the *combined operations* of the Muncie and Plum Tree plants in 1962 and 1963. Although Respondent claims that the losses are entirely attributable to the potato operations at the Muncie plant, it offered no documentary support for this claim. I therefore find, as shown by the Income Statement, that both plants were unprofitable. Nevertheless Respondent closed only the Muncie plant. As to the selling of the plant, the record shows no attempt by Respondent to find other prospective purchasers after the unsuccessful March, 1965 negotiations with a group of Muncie businessmen and the American Maize Company. Respondent has not advertised the plant for sale and the record shows that new equipment was installed around January 1, 1966. In these circumstances, and as the closing of the plant approximately 6 months after the Union won a Board election was preceded by anti-union threats predicting such action and was followed upon reopening by a hiring procedure which ignored the Union's bargaining rights and eliminated a majority of employees who voted in the election, I find, as alleged by the General Counsel, that Respondent "feigned" a permanent closing of the plant on February 4, 1965, as a device to get rid of the Union and its supporters.

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15. Respondent's letter of October 8, 1964, to the Union alleges that the contract presented by the Union on October 1 "contains substantial and material changes which we cannot accept."

As Respondent denied the complainants priority of employment for antiunion reasons, I find no merit in its argument that the method it adopted to restaff its plant by referral from the Indiana Employment Security Division did not discriminate against union applicants. I also find no merit in Respondent's argument that its hiring of 39 old employees refutes any inference of discrimination against the complainants. By refusing to bargain with the Union on the reemployment of its old employees, and by making their reemployment depend on referral by the Division—which referral was highly uncertain because it depended upon a random selection of cards—Respondent impressed upon them the futility of union representation and drastically weakened the Union's strength in the plant.

Respondent argues that in any event no finding of discrimination is permissible as to complainants who did not indicate their interest in employment by registering with the Indiana Employment Security Division or by directly applying for work at the plant. I reject this argument for the Union's letters of July 23 and August 2, 1965, gave Respondent notice that the Union, as their certified bargaining agent, was applying for work in behalf of all employees in the bargaining unit.[16] *N. L. R. B.* v. *E. L. Dell, Jr., Trading as Waycross Machine Shop,* 283 F. 2d 733, 740 (C. A. 5). Moreover, as referral by the Division for work with Respondent turned on "the luck of the draw" and Respondent refused employment to complainants who applied for work at the plant, I find that neither registration with the Division, nor an application for work at the plant, is a prerequisite to a finding of discrimination against any complainant. Cf. *N. L. R. B.* v. *Valley Die Cast Corp.*, 303 F. 2d 64, 65-67 (C. A. 6).

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16. I have found that the plant was shut down temporarily on February 4, 1965, as an antiunion stratagem. The workers in the certified bargaining unit therefore retained their status as employees of Respondent. I would reach the same result even if the shutdown was intended to be permanent, for Respondent changed its mind within 2 months, purchased tomato crops, and readied the plant for the tomato pack. Cf. *N. L. R. B.* v. *W. C. Bachelder, Receiver for Hoosier Veneer Co.*, 120 F. 2d 574, 578 (C. A. 7).

2. The Refusal to Bargain With the Union.

Rspondent's refusal to bargain with the Union on and after July 23, 1965, over the recall and reemploymnt of employees in the certified bargaining unit was violative of Section 8 (a) (5) of the Act, as it occurred within the certification year and was clearly motivated by a desire to gain time to dissipate the Union's majority status by by-passing the employees who voted in the 1964 election and restaffing the plant through the Indiana Employment Security Division. *Ray Brooks* v. *N. L. R. B.*, 348 U. S. 96; *Frank Bros. Company* v. *N. L. R. B.*, 321 U. S. 702.

Respondent contends, however, that Section 10 (b) of the Act[17] precludes such a finding because the record contains no evidence of events within the Section 10 (b) cut-off date—October 19, 1965—showing a refusal to bargain with the Union. Respondent overlooks its continued disregard of the Union in its hiring after October 19. Having been thrice turned down by Respondent, the Union was not obliged to make further useless demands for bargaining over the recall of employees. This is therefore not "a case of mere company inaction for 6 months following a refusal to bargain" but one where Respondent's "determination to refuse to recognize and bargain was actively implemented [after October 19] by its efforts to undermine the Union." *N. L. R. B.* v. *Aero Corporation*, 363 F. 2d 702, 706 (C. A. D. C.). Respondent argues in its brief that a theory of "continuing violation" is barred by *Machinists Local 1424* v. *N. L. R. B.*, 362 U. S. 41. But as stated in the *Aero Corporation* case, *supra*:

> That decision cannot be viewed so broadly. When within the six-month period there has been active conduct, as contrasted with mere passive inaction following an old offense, it is open to the Board to refer to previous acts "to shed light on the true character of matters occurring within the limitations period." 362 U. S. at 416. In effect what was involved here was a basic Company approach

17. Section 10 (b) provides in pertinent part that "no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge."

started more than six months prior to the charge, but carried forward by more recent actions. The Board in effect viewed the actions within the six-month period as reiterations by deed of the underlying refusal to bargain and hence as establishing a violation of Section 8 (a) (5). We think this was within its authority under the Act.

IV. Conclusions of Law.

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act by refusing to recall and reemploy sixty-five employees about August 1, 1965, because of their union activity.

4. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union on and after July 23, 1965.

5. Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees about their union activity and by threatening to discontinue operations rather than to operate a unionized plant.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

V. The Remedy.

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that Respondent refused employment to the sixty-five complainants because of their union activities or sympathies. I shall therefore recommend that Respondent offer them immediate and full reinstatement to their former or substantially equivalent positions at the Muncie plant, without prejudice of their seniority or other rights and privileges, dismissing if necessary all persons not employed by Respondent on February 4, 1965. If there

is not then sufficient work available for the remaining employees including those offered reinstatement, all available positions shall be distributed among them without discrimination because of their union activity or sympathy, in accordance with such system of seniority or other nondiscriminatory practice heretofore applied by Respondent in the conduct of its business. All such employees for whom jobs are not available after such distribution shall be placed on a nondiscriminatory preferential hiring list. I shall further recommend that Respondent make the complainants whole for any loss of pay suffered because of the discrimination against them. The loss of pay under the order recommended shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289, with interest added thereto in the manner set forth in *Isis Plumbing & Heating Company*, 138 NLRB 716.

I shall further recommend that Respondent bargain with the Union upon its request.

As the unfair labor practices of Respondent found herein go to the heart of the Act, it will be recommended that Respondent cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act.

RECOMMENDED ORDER.

HLH Products, Division of Hunt Oil Co., its officers, agents, successors, and assigns shall:

1. Cease and desist from

(a) Unlawfully interrogating employees about their union membership and activity or threatening them with loss of employment because of such membership or activity.

(b) Discouraging membership in the Union, or any other labor organization, by unlawfully discriminating against any of its employees in regard to their hire or tenure of employment.

(c) Refusing to bargain with the Union as the exclusive bargaining representative of its production, maintenance, and warehouse employees, including garage employees, janitors, inspectors, and local truck-drivers.

(d) In any other manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union as the exclusive representative of all the employees in the certified bargaining unit.

(b) Offer the individuals listed in the complaint, as amended at the hearing, immediate reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings suffered by reason of the discrimination against them, as provided in "The Remedy" section of this Decision.

(c) Notify the above individuals, if serving in the Armed Forces of the United States, of their right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due and the right to reinstatement under the terms of this Recommended Order.

(e) Post at its place of business and plant in Muncie, Indiana, copies of the notice attached marked "Appendix A."[18] Copies of said notice, to be furnished by the Regional Director of Region 25, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and maintained for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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18. In the event that this Recommended Order be adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words, "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

(f) Notify said Regional Director, in writing, within 20 days from receipt of this Decision and Recommended Order, what steps have been taken to comply therewith.[19]

Dated at Washington, D. C.

Appendix A.

Notice to All Employees.

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

> We Will bargain, upon request, with Local 135, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, as the representative of our production, maintenance, and warehouse employees, including garage employees, janitors, inspectors, and local truckdrivers.
>
> All Our Employees have the right to join or support a labor union. We will not in any manner interfere with their exercise of this right. Specifically, we will not question employees about their union membership and activity or threaten them with loss of employment because of such membership and activity. We will not discourage membership in Local 135, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by refusing to hire employees because of their union activity or sympathy or by discriminating in any other manner in respect to their hire or tenure of employment.
>
> We Will offer to the following employees immediate and full reinstatement to their former or substantially equivalent positions without prejudice to

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19. In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

their seniority or other rights and privileges, and make them whole for any loss of pay suffered as a result of the discrimination against them.

Finley Barnett
Charles Beasley
Martha Bell
Cletus Buck
Gertie Burke
Albert Clark
George Coffey
William Coil
Anna Conley
Casto Cooper
Clarence Cooper
Clifton Cooper
Clinton Cooper
O. D. Cooper
Junior Cope
Jett Davis
Charles Dearduff
Perry Delk
Bravel Dobbs
William Dodson
Priscilla Duncan
Margaret Earley
Pat Franklin
Allen Gates
LeRoy Gates
Wilma Gates
Henderson Gee
Jesse George
Zelpha Gibson
Virgil Gregory
A. V. Harry
Rex Hart
Joe Hicks
Norma Benedict
Kenneth Boles
Dean M. Bowles
Arnold Hines
Pearl Holt
Dewey Howard
Oscar Huddleston
Ather Hurt
Thelma Little
Herbert Merrill
Ethel Metzger
Mary Mickel
Paul Millington
Ethel Neese
Mary O'Neill
Russell Pollard
Oma Jean Rains
Dorothy Reagan
James Reagan
James Reeder
Willard Reynolds
Bessie Roberts
Betty Robinson
Jackie Robinson
Walter Rowls
Audrey Rutledge
Mary Sams
Raymond Scott
Earl Stephens
Billy Thrasher
Ann Throckmorton
Noble Troutman

HLH Products, Division of Hunt Oil Co.,
Employer

Dated_____ By_____
(Title)

Note: We will notify the above-named employees, if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, ISTA Center, 150 West Market Street, Indianapolis, Indiana, 46204, Telephone No. 633-8921.

DECISION AND ORDER.

On November 21, 1966, Trial Examiner Melvin Pollack issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions to the Decision and a supporting brief, and the General Counsel filed a brief in support of the Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following modifications.[1]

---

1. Respondent contends that the 8(a) (5) allegation should be dismissed because no refusal to bargain by the Respondent occurred within 6 months of the April 19 amended charge specifying an 8(a) (5). However, the original charge alleging 8(a) (1) and 8(a) (3) was filed on November 2, 1965, and within the 10(b) period the Respondent's July-August discriminatory recall policy occurred. This activity in itself constituted a violation not only of Section 8(a) (1) and (3) as alleged and as found by the Trial Examiner, but also, by its very nature, a refusal to bargain. Respondent by this unlawful discrimination made clear that it sought to avoid its bargaining obligation. Therefore, we find it unnecessary to rely upon the continuing nature of the Union's demand, as the Trial Examiner did by considering the Respondent's October hiring policy in itself a rejection of bargaining, and we base our 8(a) (5) finding and order on the Respondent's

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order, the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, HLH Products Division of Hunt Oil Co., Muncie, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.[2]

Dated, Washington, D. C. May 4, 1967.

John H. Fanning,
Member,

Howard Jenkins, Jr.
Member,

Sam Zagoria,
Member,

(seal) National Labor Relations Board.

8(a) (1) and (3) activity which, as the Trial Examiner found, was aimed at keeping this certified Union out of the plant. The Board is not prevented from considering and deciding that conduct violative of one section of the Act is also violative of another section simply because that section was not specifically alleged. See *N. L. R. B.* v. *Pecheur Lozenge Co.*, 209 F. 2d 393, 402 (C. A. 2); *American Newspaper Publishers Ass'n* v. *N. L. R. B.*, 193 F. 2d 782, 800 (C. A. 7), cert. denied 344 U.S. 812. An affirmative order would in any event be required here to restore the status quo ante and to remedy the 8(a) (1) and (3) violations we have found because the Respondent's conduct clearly evinces a rejection of its duty to bargain collectively as evidenced by the flagrant 8(a) (1) and (3) conduct which we have found. See *Aero Corporation*, 149 NLRB 1283, footnote 3, enfd. 363 F. 2d 702 (C. A. D. C.).

2. Substitute the word Employees for that of Employers in the second paragraph of the Notice attached to the Trial Examiner's Decision.

The Decision Of The Court Of Appeals For The Seventh Circuit

June 6, 1968

Before Knoch, *Senior Circuit Judge,* Kiley and Fairchild, *Circuit Judges.*

Fairchild, *Circuit Judge.* This case is before us on petition of HLH Products, Division of Hunt Oil Co., to review an order of the National Labor Relations Board. The board petitioned for enforcement.[1]

The company operates a number of canneries. The plant involved here is located at Muncie, Indiana. It has normally packed tomatoes from August to early October and potatoes thereafter, depending upon availability, until some date in the spring.

Local 135, Teamsters, was bargaining agent for production, maintenance, and warehouse employees. This unit included some 100 workers. There was a year-round work force and additional temporary help was usually employed during the tomato season.

On February 4, 1965, the company closed the plant and terminated all but a few employees. In July, however, it began to recruit for the tomato season, and proceeded to operate. It sought workers through the Indiana Employment Security Division. It did not directly recall its old employees in the bargaining unit, although it arranged with the Division to send letters inviting them to apply at the Division office. It continued in operation and packed potatoes, starting in October.

Approximately 600 applicants were hired by the company, including some former employees. Sixty to 65 out of the 100 employees who were in the unit in February, 1965, were not reemployed. A number of these applied to the company but were rejected.

1. The board decision is reported at 164 N.L.R.B. No. 61.

The trial examiner made findings and concluded therefrom (1) that the company violated section 8(a)(3) and (1) of the Act by refusing to recall and reemploy 65 employees because of their union activity; (2) that it violated section 8(a)(5) and (1) by refusing to bargain on and after July 23, 1965; and (3) that it violated section 8(a)(1) by coercively interrogating employees about their union activity and by threatening to discontinue operations rather than to operate a unionized plant.

The board adopted the findings and conclusions of the trial examiner, except with respect to certain reasoning concerning the refusal to bargain and the justification for a bargaining order. The order here under review, includes, among others, a requirement that the company bargain collectively with the union upon request, as well as offer reinstatement and replace lost earnings.

1. *The finding of an unfair labor practice by discrimination on account of union activity.*

It is clear that less than 40% of the employees in the bargaining unit on February 4, 1965 were put back to work in August. The company contends that the failure to employ others did not result from unlawful discrimination. It appears to be the company view that Mr. Hunt decided in February to close the Muncie plant because it was losing money; that he made unsuccessful efforts to sell; that he decided to operate again so that the plant would be more readily salable; that management doubted the desire of its former employees to return after five months and decided it would be easier to recruit through the state employment service; that the former employees who were interested in working had an equal chance with all other prospects; that failure of any former employee to obtain a job was fortuitous, due either to not being called by the state employment service in random selection from its pool of prospects, or to the fact that an appropriate job was not available when a former employee applied at the plant.

The record contains a wealth of evidence that the company had been aggressive in its opposition to the union in the past. There was testimony that manage-

ment promoted a decertification petition in 1964, and sent representatives to tell employees individually and in groups that the plant would be closed unless the union were voted out. The union won the election in July, 1964, by a vote of 65 to 25.

There was testimony that supervisors remarked in February, 1965, that the plant was closed on account of the union, and at the time of reopening that union adherents were not wanted. In July and August, the union's business representative wrote the company asking that the old employees be recalled, but these requests were denied.

The trial examiner pointed out that the former employees appeared to be a competent work force and that the natural thing for the company to do would have been to follow its former practice and recall its employees; that many persons referred by the state employment service worked a day or less, but that the company did not hire old and reliable employees who applied at the plant; that anti-union statements were made to several. He said he was unconvinced by the company's explanation of the closing and reopening.

The trial examiner made the following findings, among others:

> "I find from the foregoing circumstances, evaluated against Respondent's sponsorship of a decertification petition and its threats before the July, 1964 election to close the Muncie plant if the Union won the election, that Respondent failed to recall and reemploy the workers employed before the shut down of February 2, 1965, because it knew that most of them were union supporters and it wanted to keep the Union out of the plant.
>
> . . . .
>
> "In these circumstances, and as the closing of the plant approximately 6 months after the Union won a Board election was preceded by anti-union threats predicting such action and was followed upon reopening by a hiring procedure which ignored the Union's bargaining rights and eliminated a major-

ity of employees who voted in the election, I find, as alleged by the General Counsel, that Respondent 'feigned' a permanent closing of the plant on February 4, 1965, as a device to get rid of the Union and its supporters.

. . . .

"By refusing to bargain with the Union on the reemployment of its old employees, and by making their reemployment depend on referral by the Division—which referral was highly uncertain because it depended upon a random selection of cards—Respondent impressed upon them the futility of union representation and drastically weakened the Union's strength in the plant."

The findings are supported by substantial evidence in the record considered as a whole.

2. *The finding of refusal to bargain and the order to bargain upon request.*

There were demands for bargaining made by the union and rejected by the company in July and August, 1965. The charge on which the complaint was based was filed November 2, 1965 and asserted unfair labor practices under section 8(a)(1) and (3), describing the discriminatory refusal to recall on account of support of the union. An amended charge was filed April 18, 1966, adding section 8(a)(5) and describing the refusal to bargain in July and August "and at all times thereafter". Obviously the specific demands and refusals were more than six months before April 18.

The trial examiner handled the sec. 10(b) issue on the theory that the union had asked to bargain about rehiring and the company continued hiring in disregard of the union after October 19, the critical date for a charge filed April 18. The board found "it unnecessary to rely upon the continuing nature of the Union's demand, as the Trial Examiner did by considering the Respondent's October hiring policy in itself a rejection of bargaining".

The board based its 8(a)(5) finding on the discriminatory recall policy, saying

> "This activity in itself constituted a violation not only of section 8(a)(1) and (3) as alleged and as found by the Trial Examiner, but also, by its very nature, a refusal to bargain. Respondent by this unlawful discrimination made clear that it sought to avoid its bargaining obligation.—The Board is not prevented from considering and deciding that conduct violative of one section of the Act is also violative of another section simply because that section was not specifically alleged."

Apart from whether the discriminatory hiring, charged to be an 8(a)(3) and (1) unfair labor practice, could also be found to be a refusal to bargain and an 8(a)(5) unfair labor practice, though not asserted in the original, and timely, charge, the board asserted this justification for including a bargaining order:

> "An affirmative order would in any event be required here to restore the status quo ante and to remedy the 8(a)(1) and (3) violations we have found because the Respondent's conduct clearly evinces a rejection of its duty to bargain collectively as evidenced by the flagrant 8(a)(1) and (3) conduct which we have found."

Both lines of reasoning asserted by the board make sense in the circumstances of this case. We choose to rest our decision, enforcing the order, including the requirement to bargain, upon the latter.

3. *The finding of an unfair labor practice by coercive interrogation and threats.*

The trial examiner and board found that the company violated sec. 8(a)(1) of the act by "Chester Miller's interrogation of Pollard about his union affiliation, and by Albert Glass' statement to Cooper that the plant would operate only if the Union was kept out".

The company confines its challenge to the Miller episode, saying that Pollard's testimony is unworthy and inadequate to support the finding because "indefinite, contradictory, vague, uncertain, and capricious".

The trial examiner stated: "Pollard was confused about dates and did not recall Miller's name or whether Miller came from Texas or Florida. The record shows, however, that Miller was the acting plant manager just before the tomato season started. As Pollard described his conversation with Miller and the Glasses with particularity and impressed me as a reliable witness, I credit his tsetimony concerning these conversation." Miller is managed of a company plant in Florida and was sent to Muncie for three weeks to assist in opening the plant. The company headquarters are in Texas. Pollard said he was referred to the plant manager when he asked for work.

We have read the record of Pollard's testimony, as well as the testimony in conflict and find therein no reason to say that the examiner who saw and heard the witnesses could not or should not have believed what he said.

The board's order will be enforced.

KNOCH, *Senior Circuit Judge.* (dissenting in part.) With the sole exception of enforcement of the bargaining order, I concur in the opinion of the majority. I am of the opinion that the petitioner company must have been misled by the complaint. It is unreasonable, in the circumstances of this case, to expect the company to have anticipated that the allegations respecting § 8(a)(1) and (3) would be the basis of a finding that § 8(a)(5) had been violated.

I think the majority has recognized that position in choosing instead to rely on the Board's justification of a bargaining order here as an appropriate remedy for the § 8(a)(1) and (3) violations.

However, absent a finding of a § 8(a)(5) violation, I believe that a bargaining order is an appropriate remedy only:

> "In those exceptional cases where the employer's unfair labor practices are so outrageous and pervasive and of such a nature that their coercive

> effects cannot be eliminated by the application of traditional remedies. . . ." *NLRB* v. *S.S. Logan Packing Co.*, 4 Cir., 1967, 386 F. 2d 562, 570.

See also *NLRB* v. *River Togs, Inc.*, 2 Cir., 1967, 382 F. 2d 198; *NLRB* v. *Flomatic Corp.*, 2 Cir., 1965, 347 F. 2d 74, 77.

I cannot agree that this is such an exceptional case that a bargaining order is justified as an appropriate remedy for the § 8(a)(1) and (3) violations which were found.

STATUTE INVOLVED

The following provisions of the Labor Management Relations Act, 61 STAT. 136, et seq. (1947), 29 U.S.C. § 151, et seq.:

Sec. 8(a)(1), (3), Labor Management Relations Act, 61 STAT. 140 (1947), 29 U.S.C. § 158(a)(1), (3):

"SEC. 8(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

" * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * *."

Sec. 10(b), Labor Management Relations Act, 61 STAT. 140 (1947), 29 U.S.C. § 160(b):

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. * * * "

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No. 588

In the Supreme Court of the United States

OCTOBER TERM, 1968

HLH PRODUCTS, DIVISION OF HUNT OIL CO.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21a–27a) is reported at 396 F. 2d 270. The Board's decision (19a–20a, 1a–14a) is reported at 164 NLRB No. 61.

JURISDICTION

The opinion of the court of appeals was issued on June 6, 1968 (Pet. App. 21a). A petition for rehearing was denied, and the decree was entered, on July 8, 1968 (Pet. 1–2). The petition for a writ of certiorari was filed on September 30, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board's finding that the employer refused to recall certain employees because of their union activity was invalid because the Board considered, as background evidence, matters occurring prior to the six-month limitation period in Section 10(b) of the National Labor Relations Act.

2. Whether the Board properly exercised its remedial authority in ordering the employer to bargain with the certified union upon request.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix to the petition (Pet. App. 28a).

STATEMENT

Petitioner is engaged in processing and canning food products at plants in several states, including one at Muncie, Indiana (Pet. App. 1a; J.A. 40–41).[1] In September 1962, petitioner concluded an agreement with the Union,[2] which had been certified by the Board, covering the Muncie plant (Pet. App. 2a; J.A. 367–372, 40).

About the time the agreement expired on March 31, 1964 (Pet. App. 2a; J.A. 376), a Company representative, William Butterfield, and Foreman Jim Reyn-

[1] "J.A." refers to the joint appendix to the briefs in the court below, copies of which have been filed with this Court.

[2] Local 135, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

olds arranged for and held a meeting with employees to consider "voting [the Union] out" (Pet. App. 2a; J.A. 44, 69–72, 75, 89–90, 114). Thereafter, Reynolds drove an employee, in a Company car, to the Board's Regional office for the purpose of filing a decertification petition (Pet. App. 2a; J.A. 71). During the subsequent election campaign, Butterfield visited numerous employees at their homes, telling them that petitioner would close the plant if the Union won the election (Pet. App. 2a–3a; J.A. 214–215, 225, 125, 120, 131, 135, 145, 162). The day before the election, production was halted at the plant and Butterfield told assembled employees that Company President H. L. Hunt would close the plant within six months or a year if the Union won the election (Pet. App. 3a; J.A. 215–216, 226–227).

The Union won the election by a vote of 65–25 and was recertified as the bargaining agent on July 27, 1964 (Pet. App. 3a; J.A. 361–364, 31–32). However, after a period of bargaining, the parties were unable to reach an agreement (Pet. App. 3a; J.A. 247, 253–257, 262–263).

On February 4, 1965, petitioner posted a notice at the Muncie plant stating that it was ceasing operations there (Pet. App. 4a; J.A. 33, 52, 60–61, 365). Plant Manager Peter Lux and Foreman Albert Glass told employee Russell Pollard that the plant was being shut down because of the Union (Pet. App. 4a; J.A. 96–97). No notices of termination were sent to employees, however, and a crew of five maintenance, office, and quality-control employees continued to work (Pet. App. 4a; J.A. 47–48, 127).

On March 20, petitioner recalled its farm manager, who had been laid off two weeks before, in order to prepare for the 1965 tomato-packing season; shortly thereafter, he began purchasing tomato crops and making arrangements for their harvesting (Pet. App. 4a; J.A. 283–285). About May 15, the maintenance employees began preparing the plant for the tomato pack (Pet. App. 4a; J.A. 277), and, on June 3, John Volz, the new plant manager, informed petitioner's senior legal officer of plans to recruit labor for the tomato pack (J.A. 401–403). In previous years, employees had annually been laid off for a period of six to eight weeks because of the changeover from potato packing to tomato packing (J.A. 41, 48–49, 59, 126), and petitioner had recalled laid-off employees by post card or telephone (Pet. App. 4a; J.A. 54, 119, 123, 132, 145). On this occasion, however, the Company decided to recruit employees through the Indiana Employment Security Division. The Company supplied the Division with a list of employees and their addresses compiled from its records (Pet. App. 4a; J.A. 279, 306). The Division sent letters to those employees who lived in Indiana, advising them that the Company needed workers to process tomatoes and inviting them and "your friends" to register for work with the Division on July 22 and 23, 1965 (Pet. App. 4a; J.A. 387, 291, 296). The Division also advertised for cannery workers generally by newspaper and radio (Pet. App. 4a; J.A. 54, 44, 291, 296–297).

On July 23, the Union wrote petitioner, stating that it had received information that the Muncie

plant would be reopened and requesting that petitioner recall old employees "in their seniority order" and "meet with our representatives to negotiate a new contract" (Pet. App. 5a; J.A. 376). Petitioner replied on July 27, stating that operations at the plant would probably be "temporary and seasonal," that its contract with the Union had expired and that it believed "former employees of our Muncie plant have better employment than we can provide" (Pet. App. 5a; J.A. 373). On August 2, the Union wrote petitioner, claiming the jobs at the reopened plant and asking for further negotiations; petitioner's reply restated the position expressed in its prior letter (Pet. App. 5a; J.A. 377–379).

The Employment Division took the names of those who responded to the letters and advertisements and, when petitioner asked for workers, the Division selected registered persons at random and sent them to the Company (Pet. App. 4a; J.A. 292–294, 297–298, 300–301). Some old employees were not notified by the Division and others who were notified and signed up were not referred (J.A. 291–292, 123, 144, 133). The persons referred were required to fill out Company application forms and were interviewed (Pet. App. 5a–6a; J.A. 52–55, 317–318). Petitioner interviewed some 700 persons and hired about 600, some of whom worked only a day or less (Pet. App. 5a–6a; J.A. 52–55, 317–318, 53–54). Petitioner also hired "quite a few" people "off the street" (J.A. 327). Neither petitioner nor the Employment Division gave preference to the old employees (Pet. App. 4a, 8a; J.A. 300–301, 317–318).

During the period from late July to September 1965, when petitioner was restaffing its plant, a number of old employees went to the plant and asked for work, but petitioner refused to rehire them (Pet. App. 6a–7a; J.A. 79–80, 84–85, 196–197, 98–99, 164–168, 112–113, 134–135, 142–144, 138, 123–124, 232). Company officials told one employee that the plant would operate if the Union was kept quiet, but that it would be closed if "they got the Union started back up again" (Pet. App. 6a, n. 10; J.A. 79–80, 84–85); they questioned another employee about his union membership and told him, "we just don't want union members in the plant" (Pet. App. 6a; J.A. 98–99). Similar statements were made to other applicants (Pet. App. 6a–7a; J.A. 164–165, 196–197).

On November 2, 1965, employee Audrey Rutledge filed charges with the Board alleging that petitioner's refusal to recall old employees violated Section 8(a)(1) and (3) of the Act (J.A. 6). A complaint issued on this charge (J.A. 8). On April 19, 1966, Mrs. Rutledge filed another charge alleging, *inter alia,* that petitioner refused to bargain with the Union in violation of Section 8(a)(5) (J.A. 20–22). An amended complaint covering this charge was issued (J.A. 22–25).

The Board, affirming the Trial Examiner, found that the Company failed to recall and reemploy the workers employed before the shutdown of February 2, 1965, because it knew that most of them were union supporters and it wanted to keep the Union out of the plant, and held that such failure violated Section

8(a)(1) and (3) of the Act (Pet. App. 9a, 13a). The Board further held that, since the Company's conduct in restaffing its plant "made clear that it sought to avoid its bargaining obligation" to the certified Union, the Company thereby also refused to bargain in violation of Section 8(a)(5) (Pet. App. 19a–20a, n. 1).[3] The Board ordered petitioner to cease and desist from the unfair labor practices found; to reinstate the employees discriminated against and pay them lost wages; and to bargain with the Union upon request (Pet. App. 14a–18a). The Board found that a bargaining order was necessary, even without the Section 8(a)(5) finding, since the Company's violation of Section 8(a)(1) and (3) "clearly evinces a rejection of its duty to bargain collectively" (Pet. App. 20a, n. 1).

The court of appeals held that the Board's findings were supported by substantial evidence and enforced the Board's order (Pet. App. 21a–26a).[4] The court rested its enforcement of the bargaining order upon the Board's alternative finding, *i.e.*, that the order was appropriate to remedy the Company's violations of Section 8(a)(1) and (3) of the Act (Pet. App. 25a).

ARGUMENT

1. Petitioner contends that the Board's finding of a violation was based on events occuring prior to the

[3] The Board also found that petitioner had violated Section 8(a)(1) of the Act by coercively interrogating and threatening individual employees (Pet. App. 8a–9a).

[4] Judge Knoch would not have enforced the bargaining order (Pet. App. 26a–27a).

six-months limitations period in Section 10(b) of the Act.[5] This contention is barred by Section 10(e) of the Act,[6] since petitioner did not urge it before the Board.[7]

In any event, the Board complied with the standard which this Court has established, *viz.*, that pre-limitations "events may be utilized to shed light on the true character of matters occurring within the limitations period," but "conduct occurring within the limitations period can [not] be charged to be [unlawful] only through reliance on an earlier unfair labor practice." *Local 1424* v. *National Labor Relations Board* (*Bryan Mfg. Co.*), 362 U.S. 411, 416–417. The Board considered pre-limitations events in the instant case only for the limited purpose of providing background (Pet. App. 9a), and not to "revive a legally defunct unfair labor practice" (*ibid.*). The substance of the violation found by the Board, the reopening and the restaffing of the Muncie plant, occurred dur-

[5] In relevant part, Section 10(b) provides that "[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board * * *."

[6] In relevant part, Section 10(e) provides that: "No objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

[7] Petitioner urged the contention for the first time in its brief in the court below. Before the Board, petitioner merely urged that the Examiner's Section 8(a)(5) finding was barred by Section 10(b); the Board found it unnecessary to resolve the question by adopting a different theory of the 8(a)(5) violation (Pet. App. 19a, n. 1).

ing the six-month period prior to the filing of the relevant charge on November 2, 1965. The Board's opinion relied principally upon events occurring within the limitations period (Pet. App. 5a–8a).

2. The court also properly upheld the order directing the Company to bargain with the Union. It is well settled that such an order is an appropriate remedy for a violation of the duty to bargain imposed by Section 8(a)(5) of the Act. See, *e.g., Franks Bros. Co.* v. *National Labor Relations Board,* 321 U.S. 702. It is also settled that a bargaining order may be appropriate to remedy violations of Sections 8(a)(1) or 8(a)(3), where by those violations the employer has sought to avoid its bargaining obligation.[8] Here, as the Board found, the Company's discriminatory restaffing of a plant whose employees were represented by a certified bargaining agent constituted a "flagrant" violation of the Act, and evidenced a clear

[8] *D. H. Holmes* v. *National Labor Relations Board*, 179 F. 2d 876, 879–880 (C.A. 5); *National Labor Relations Board* v. *Caldarera*, 209 F. 2d 265, 268–269 (C.A. 8); *Summit Mining Corp.* v. *National Labor Relations Board*, 260 F. 2d 894, 900 (C.A. 3); *Editorial "El Imparcial," Inc.* v. *National Labor Relations Board*, 278 F. 2d 184, 187 (C.A. 1); *Piasecki Aircraft Corp.* v. *National Labor Relations Board*, 280 F. 2d 575, 591–592 (C.A. 3), certiorari denied, 364 U.S. 933; *National Labor Relations Board* v. *Delight Bakery Inc.*, 353 F. 2d 344, 346–347 (C.A. 6); *Wausau Steel Corp.* v. *National Labor Relations Board*, 377 F. 2d 369, 373–374 (C.A. 7); *J. C. Penney Co.* v. *National Labor Relations Board*, 384 F. 2d 479, 486 (C.A. 10); *United Steelworkers of America (Northwest Engineering Co.)* v. *National Labor Relations Board*, 376 F. 2d 770, 772–773 (C.A. D.C.), certiorari denied, 389 U.S. 932; *Local No. 152, Teamsters Union* v. *National Labor Relations Board*, 343 F. 2d 307, 309 (C.A. D.C.).

"rejection of its duty to bargain collectively" (Pet. App. 20a, n. 1).

The authorities cited by petitioner, in which courts of appeals have refused to enforce bargaining orders (Pet. 16–18), are distinguishable on their facts and thus do not present a conflict. In none of the cited cases were the unfair labor practices as destructive of the principle of collective bargaining as those found here. *National Labor Relations Board* v. *Flomatic Corp.*, 347 F. 2d 74 (C.A. 2), involved only a "borderline, unaggravated § 8(a)(1) violation standing alone" (*id.* at 79), or, as the same court later termed it, "only a minimal Section 8(a)(1) violation." *Irving Air Chute Co.* v. *National Labor Relations Board*, 350 F. 2d 176, 182 (C.A. 2). In *National Labor Relations Board* v. *River Togs, Inc.*, 382 F. 2d 198 (C.A. 2), and *Peoples Service Drug Stores, Inc.* v. *National Labor Relations Board*, 375 F. 2d 551 (C.A. 6), the Section 8(a)(1) violations, although more substantial, did not, as here, disrupt an established bargaining relationship.[9]

[9] In *Crawford Manufacturing Co.* v. *National Labor Relations Board*, 386 F. 2d 367, 372 (C.A. 4), certiorari denied, 390 U.S. 1028, and *National Labor Relations Board* v. *S. S. Logan Packing Co.*, 386 F. 2d 562, 568 (C.A. 4), the unions involved sought to establish majority status on the basis of authorization cards, but the Fourth Circuit held that the cards were insufficient for that purpose; there was thus no basis for a bargaining order. The Union here twice had its representative status established by a Board election.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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